

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

VOUTY THOL,

Petitioner,

v.

DOUG WADDINGTON,

Respondent.

Case No. C05-5373RJB

ORDER DENYING STAY AND  
DIRECTING SERVICE OF  
PETITIONER'S AMENDED  
PETITION

This 28 U.S.C. § 2254 petition for habeas corpus relief has been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636 (b) and local Rules MJR 3 and 4. Before the court is petitioner's motion to stay this petition as he currently has a personal restraint petition pending in the state court system that challenges a jury instruction petitioner claims was improper. (Dkt. # 5).

Two weeks after filing the motion for stay, one week before the motion was noted to be heard, petitioner filed an amended petition. The single issue he is pursuing is the jury instruction claim. (Dkt. # 6).

In Rhine v. Weber, \_\_\_\_ U.S. \_\_\_\_, 125 S. Ct. 1528 (2005), the Supreme Court approved of the practice of staying appropriate cases to allow a petitioner to return to state court and exhaust issues. The court in Rhines indicated that stay should be granted only on a showing of good cause. The showing must include a good reason for not exhausting the issue on direct appeal or prior to

1 filing in federal court. An Order to Show Cause was entered in this case and petitioner has  
2 responded. (Dkt. # 8).

3 Petitioner indicates he has exhaust the jury instruction issue on direct appeal. He has re-  
4 raised this issue on collateral review "in the interests of justice." (Dkt. # 8). In the response  
5 petitioner concedes all other claims in the federal habeas petition are unexhausted. Petitioner states:

6 With regard to the other claims (2-7) raised in the habeas corpus petition  
7 those issues are unexhausted, in which petitioner is no longer pursuing those issues in  
8 the state courts due to the time limitation had already expired. Therefore, petitioner  
9 respectfully request that those issues be dismissed only if the accomplice liability claim  
is stayed pending the resolution of the state habeas action and petitioner does not  
have to delete the other claims (2-7), then re-submit another petition containing only  
the erroneous accomplice liability claim to the court.

10 However, if petitioner has to delete the unexhausted claims (2-7) from his  
11 petition and re-submit another habeas petition (which could mean having his petition  
12 dismissed due to the time limitation being expired), petitioner respectfully request to  
13 withdraw his first habeas petition and then request a stay on his amended petition that  
was sent to the United States District Court, at Seattle on June 15<sup>th</sup>, 2005. That  
amended petition only contain the erroneous accomplice liability claim which is fully  
exhausted.

14 (Dkt. # 8, page 2 and 3).

15 Petitioner has not shown good cause for a stay and there is no reason to stay an exhausted  
16 petition. The motion to stay is **DENIED**.

17 A person has a right under the federal civil rules to amend a complaint once as a matter of  
18 course. The amended petition in this action raises the only exhausted claim and will act as a  
19 complete substitute for the original. Thus, the petition in this action is the amended petition, (Dkt. #  
20 6). The court now ORDERS:

21 (1) The clerk shall arrange for service by certified mail upon respondent, a copy of the  
22 amended petition, (Dkt. # 6), of all documents in support thereof, and of this Order. All costs of  
23 service shall be advanced by the United States. The Clerk shall assemble the necessary documents to  
24 effect service. The Clerk shall send petitioner a copy of this Order, the General Order. The clerk  
25 will also send a courtesy copy of the petition to the Washington State Attorney General's Office  
26 Criminal Justice Division.

27 (2) Within forty-five (45) days after such service, respondent shall file and serve an  
28 ORDER FOR SERVICE AND RETURN, 2254 PETITION - 2

1 answer in accordance with Rule 5 of the Rules Governing § 2254 Cases in United States District  
2 Courts. As part of such answer, respondents should state whether petitioner has exhausted available  
3 state remedies, whether an evidentiary hearing is necessary, and whether there is any issue of abuse  
4 of delay under Rule 9. Respondent shall not file a dispositive motion in place of an answer without  
5 first showing cause as to why an answer is inadequate. Respondent shall file the answer with the  
6 Clerk of Court and serve a copy of the answer upon petitioner.

7 (3) The answer will be treated in accordance with Local Rule CR 7. Accordingly, upon  
8 receipt of the Answer the Clerk will note the matter for consideration on the fourth Friday after the  
9 answer is filed, petitioner may file and serve a response not later than on the Monday immediately  
10 preceding the Friday appointed for consideration of the matter, and respondent may file and serve a  
11 reply brief not later than on the Thursday immediately preceding the Friday designated for  
12 consideration of the matter.

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14 DATED this 15<sup>th</sup> day of August, 2005.

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17 Karen L. Strombom  
18 United States Magistrate Judge  
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